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No. 03-101

In the

Supreme Court of the United States

GALE NORTON,
Secretary of the Interior, et al.,

Petitioners,

v.

SOUTHERN UTAH
WILDERNESS ALLIANCE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the authority of the federal courts under the Administrative Procedure Act, 5 U.S.C. § 706(1), "to compel agency action unlawfully withheld or unreasonably delayed" extends to review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Over 25,000 individuals, organizations, and associations support PLF's efforts nationwide. PLF has participated in numerous cases concerning the authority of administrative agencies to exercise the discretion delegated to them under acts of Congress and the appropriateness of judicial review of administrative agency actions under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.* For example, PLF participated as amicus curiae before this Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (*Ohio Forestry*), *Bennett v. Spear*, 520 U.S. 154 (1997) (*Bennett*); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (*Lujan*), *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Amicus seeks to augment the argument of Petitioners' brief by discussing how the statutory scheme set out under the APA reflects Congress's intent to permit judicial review of *administrative actions* taken by agencies relating to rulemaking or adjudication. Environmental Respondents should not be allowed to disregard this important, but limited, application of the APA and turn our courts into day-to-day managers of our public resources. PLF believes that its previous litigation experience with respect to the APA will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme Court Rule 37, written

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Environmental Respondents are of the opinion that the Bureau of Land Management (BLM) is ineffectively managing our nation's natural resources—particularly potential wilderness areas. Respondents worry that due to the BLM's failure to engage in a more proactive program to keep off-road vehicles out of potential wilderness areas, Congress will not be inclined to designate these areas as wilderness in the future. Under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701, *et seq.*, BLM must manage areas that have the potential to be congressionally designated as wilderness areas in a manner that does not "impair" such designation. The BLM's "interim management policy" for the wilderness study areas, however, does not require that the lands be managed as though they had already been designated as wilderness. 44 Fed. Reg. 72,014, 72,016 (1979). The BLM retains discretion as to the development and implementation of the policy.

Respondents also claim the BLM has only partially implemented its land use plans developed for the potential wilderness and surrounding areas. Under the FLPMA, the BLM must prepare land use plans, and the BLM's own regulations require that it adhere to the terms, conditions, and decisions of officially approved plans. The plans included provisions for monitoring of off-road vehicle activity in the area surrounding the study units and development and implementation of off-road vehicle management plans. The BLM, however, has the discretion to revise the land use plans "as appropriate." 43 U.S.C. § 1712(a). At the time litigation began, the BLM was engaged in the ongoing implementation of these plans.

Finally, Respondents allege that, since there has been an increase in off-road vehicle activity in and around the

wilderness study areas, a revision of the existing environmental documents is in order. Under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et. seq.*, federal agencies must prepare environmental reviews for proposals for legislation and other major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). Environmental reviews must be updated or supplemented in cases when a substantial change on a proposed action occurs, or when there are significant new circumstances or information relevant to the environmental concerns that bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1) (2003).

In order to compel a more forceful "potential wilderness protection program," Respondents relied on Section 706 of the APA, 5 U.S.C. § 551, *et seq.*, to challenge BLM's "inaction" to comply with the nonimpairment mandate. They also used the APA to challenge the BLM's failure to completely implement its off-road vehicle management plan, as identified in the land use plans. Additionally, the groups argued that the BLM failed to consider whether a new environmental document was needed due to the increased off-road vehicle traffic around the wilderness study areas.

The district court dismissed the claims. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d at 1222 (10th Cir. 2002) (*SUWA*). On appeal, the Tenth Circuit reversed, holding that, under APA Section 706(1), the claims were proper. The court reasoned that the BLM had mandatory, nondiscretionary duties to (1) manage the wilderness study areas in accordance with the FLPMA's nonimpairment mandate, (2) deal with off-road vehicle use as outlined in the land use plans, and (3) take a "hard look" at whether a supplemental environmental document was needed. Thus, any failure to take steps to accomplish these mandates was "an agency action" reviewable by the court under the APA.

This Court agreed to determine whether APA Section 706(1) allows judicial review of actions that are neither agency actions as defined by the APA, nor final. Amicus will address how the Tenth Circuit's impermissible expansion of the scope of judicial review results from a failure to correctly interpret Section 706's role in the overall statutory scheme.

SUMMARY OF ARGUMENT

This case deals with an attempt by environmental groups to take full command of the Bureau of Land Management's (BLM) administration of its programs because they are unhappy with the way the BLM implements these programs. To accomplish this, environmental litigants are using the APA as their weapon of choice.

The APA is not a license for the courts to review and redirect any and all agency acts. The judicial review authorization under the APA applies only in certain, limited circumstances. To determine when review is appropriate, the nature of the administrative action involved is key. Unless there is other statutory authority, the agency action under review must be linked with the APA's rulemaking or adjudication processes. It must result in a rule, order, license, sanction, relief, or the equivalent or denial thereof. An agency's failure to take steps is reviewable if related to the type of agency action contemplated by the APA. Only in such situations does the APA provide an avenue for private citizens to challenge agency activities.

In addition, where a specific statute does not authorize judicial review of an agency action, Congress has provided for such review under the APA *only when* the administrative action under scrutiny is determined to be "final" in nature. To determine finality, this Court asks whether the agency has completed its decisionmaking process and whether the result of that process is one that will directly affect the parties. Only where this "finality" test is met—assuming other Section 701

requirements are complied with—can a private party ask the court to determine whether it is appropriate to compel an agency to act a certain way under Section 706(1).

By disregarding the judicial review limitations found in the APA, the Tenth Circuit impermissibly turns its back on congressional mandates. The result is that under the Tenth Circuit's analysis, any agency activity now becomes fodder for litigation under the APA even when such activity does not involve rulemaking or adjudication processes. The decision turns statements of program ideals into judicially enforceable obligations that override the judgment of the administrative agency that has been delegated with the task of turning goals into reality. This is contrary to the premise that environmental Respondents "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891. It is also contrary to constitutional prohibitions against the usurpation of the executive powers by the judiciary.

ARGUMENT

I

THE TENTH CIRCUIT'S INTERPRETATION OF APA SECTION 706 FAILS TO RECOGNIZE THE PURPOSE AND STRUCTURE OF THE ACT

A. The APA Does Not Give License to a Private Party to Litigate Everything the Administrative Agencies Do, but Does Allow Judicial Review in Limited, Specific Instances

One need only look at the structure of the APA to decipher that the Act's judicial review provisions apply only to certain, limited instances. For the present determination, the most relevant sections of the APA are those defining terms under the APA, those dealing with procedural requirements for administrative agencies, and those dealing with the judicial

review of agency actions. 5 U.S.C. §§ 551, 552(a)(2), 553(b), (c), 554, 701, 702, 704. Judicial review under the APA, and the scope of that review, are addressed in the Judicial Review Chapter—Sections 701 through 706. Section 701(b)(2) states that for purposes of this chapter, the terms "agency action," "rule," "order," "license," "sanction," and "relief" have the meanings given to them by Section 551 of the APA. Section 551(13) defines "agency action" to include the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a failure to act. Section 551(5) defines "rulemaking" to mean an agency process for formulating, amending, or repealing a rule. A "rule" is defined as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. 5 U.S.C. § 551(4). Section 551(7) defines "adjudication" to mean an agency process for the formulation of an order.

Section 704 permits a federal court to consider any "agency action" if expressly authorized in a statute, or any "final agency action" dealing with a rulemaking or adjudication (order, license, sanction, or relief) as long as there is no other adequate remedy in a court. Preliminary and other nonfinal agency action is reviewable "on the review of the final agency action." 5 U.S.C. § 704. If the action is reviewable, then Section 706 indicates the scope of that review, which allows the compelling of an agency action unlawfully withheld or unreasonably delayed, or the setting aside actions that are unlawful due to a number of factors. 5 U.S.C. § 706(1), (2).

Only when the claim meets all the requirements described above can a court, guided by Section 706, apply the appropriate standard of review depending on the remedy sought. *Id.* at 884; *Bennett*, 520 U.S. at 175-79 (allowing claim for relief under Section 706(2)(a) to proceed only after determination that Sections 701, 702, and 704 requirements had been met);

Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232, 238 n.7 (1980) (*Standard Oil Co.*) (request to withdraw administrative complaint under Section 706 not reviewable under Section 704); *Home Builders Association of Greater Chicago v. United States Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003) (*Greater Chicago*) (claim for injunctive relief under Section 706(2) allowed to proceed because Sections 701, 702, and 704 requirements were met). Thus, under the APA, private parties can communicate their views regarding rulemaking and adjudication to the agency decisionmakers and challenge in court the *legality of the rulemaking or adjudication*. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 101 (2003).

B. Activities Relied on by the Tenth Circuit Are Not Agency Actions as Defined by the APA

The Tenth Circuit gives a broad reading to Section 706(1), which states that a court "shall" "compel agency action unlawfully withheld or unreasonably delayed," and concludes that it has jurisdiction to review any action by the BLM. *SUWA*, 301 F.3d at 1228-29. The court's approach misconstrues the scope of judicial review under the APA by reading the definition of "agency action" under Section 551(13) out of the context of the statute. The court failed to apply the canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. It treats Section 706(1) as if it existed in an analytical vacuum, unconnected to the other sections in the Act that delineate what actions are opened to judicial review.

"Under the terms of the APA, Respondent must direct its attack against some particular 'agency action' that causes harm." *Lujan*, 497 U.S. at 891. Section 701 clearly states that the judicial review chapter applies to "agency actions" as defined by the APA. Section 551(13) defines "agency action"

to include the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a failure to act.

None of the allegations made by environmental Respondents, and reviewed by the Tenth Circuit, deal with an "agency action" as defined by Section 551(13). There are no allegations that the BLM authorized via rulemaking off-road vehicle use in the wilderness study areas, or that the BLM licensed off-road vehicle use, or that the BLM authorized via rulemaking the use of the wilderness study areas in a manner that "impaired" them, or that the BLM approved activities that are contrary to the wilderness study areas land use plans. Nor are there allegations that the BLM "granted relief" to those caught using the areas in a nonconforming manner. The failures to act alleged do not involve the failure to take an action with regard to the making of a rule, the issuance of an order, the granting of a license, the imposition of a sanction, or the granting of relief.

Furthermore, the environmental Respondents make no allegations that violations of law occurred in the designation of wilderness study areas, in the development of land use plans, in the development of the "nonimpairment" policy, or in the development of the environmental impact statements for each wilderness study area. Nor do they allege that the procedures employed as part of these decisions were flawed. Since none of the activities challenged by the Respondents fit the Section 551(13) definition of agency action, they simply are not reviewable by the court under the APA.

The only "actions" under challenge here are the BLM's day-to-day administration of public lands in a way that does not comport to the "procedures" the environmental Respondents would prefer. Without a specific authorization of Congress to make such challenges (which does not exist here), adjudication of claims based on dissatisfaction with the BLM's management

procedures are not justiciable under the APA. Thus, unless Respondents can point to some other "specific order or regulation, applying some particular measure across the board" to all wilderness study areas, they have failed to identify an "agency action" reviewable under the APA. *Lujan*, 497 U.S. at 890 n.2.

C. The Tenth Circuit's Reliance on "Inaction" to Find "Finality" for APA Purposes is Misplaced

As noted above, Section 704 permits a federal court to review a "final agency action" dealing with a rulemaking or adjudication (order, license, sanction, or relief) as long as there is no other adequate remedy in a court. In *Bennett*, this Court articulated a test to determine finality under Section 704.

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process . . . —it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights and obligations have been determined, or from which legal consequences will flow.

Bennett, 520 U.S. at 177-78 (citation omitted). Accordingly, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Thus, when a private party challenges a final, specific decision related to the APA's rulemaking or adjudicatory process, there is no difficulty meeting the "final agency action" requirement under Section 704. The party can point to the completion of the agency's decisionmaking process, and he can identify how the decision resulted in some form of concrete harm.

The Tenth Circuit's decision does find that the BLM's actions are "final," but this conclusion is not anchored on the finality requirements set forth in *Bennett*. To find a final agency action, the Tenth Circuit accepts Respondents' characterization that a failure to meet general programmatic goals are "final agency actions" for APA review purposes. *SUWA*, 301 F.3d at 1229, 1235, 1239. This approach turns unauthorized off-road vehicle use on federal lands that had been classified by the BLM as wilderness study areas into a "final agency action" reviewable under the APA. *SUWA*, 301 F.3d at 1229. Similarly, a failure to complete implementation of all activities identified in the land use plans associated with the wilderness study areas becomes reviewable under the APA. *Id.* at 1235 ("[T]he failure to implement a program specifically promised in [a land use plan] carries the same effect as if the agency had taken an 'affirmative' or 'future' action in direct defiance of its [land use plan] obligations.").

Under *Bennett*, the BLM's alleged failure to meet the broad statutory nonimpairment obligations under the Federal Land Policy and Management Act or the land use plans does not constitute a "final agency action" that can be reviewed by the court under the section 706(1) scope. As noted above, there are no allegations that the BLM authorized the use of off-road vehicles in the wilderness study areas, or that the BLM licensed off-road vehicle use, or that the BLM approved activities in wilderness study areas that would "impair" them, or that the BLM approved activities that are contrary to the wilderness study areas' land use plans. Thus, there are no allegations that point to a "final agency action"—that is, the completion of an agency's decisionmaking process resulting in a decision either determining the rights and obligations of Respondents, or from which legal consequences flow. [2]

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[2] The Tenth Circuit's decision also clashes with this Court's prudential concerns that disputes too hypothetical and speculative to (continued...)

Finally, the court below expressed a concern that, unless the BLM is compelled to take steps to meet Respondents' concept of the FLPMA's nonimpairment and land use plan mandates, a "no-man's-land" of judicial review would be created "in which a federal agency could flout mandatory, nondiscretionary duties simply because it might be able to satisfy these duties through some form of non-final action." *Id.* at 1230 n.10. Realistically, though, agency efforts to satisfy mandatory duties imposed by Congress will sooner or later lead to some agency decision having legal consequences, or creating rights or obligations. If these decisions in effect violate mandatory, nondiscretionary agency duties, reviewability under the APA may follow. Furthermore, Congress has made it clear that not all agency actions are subject to judicial review under the APA. Section 701(a) expressly forbids judicial review of any agency action under two specific circumstances: when a statute precludes such a review or when Congress has

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[2] (...continued)
permit judicial review be avoided. The ripeness doctrine is designed "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Because the Tenth Circuit's decision simply disregards the need for the agency action under review to be final in nature, it also ignores the prudential jurisdictional boundaries set by the ripeness doctrine. The perils of such entanglements are not lost on the dissenting judge, who expressed concern that the majority's misguided generosity leaves the district court with no way of determining an appropriate remedy. *SUWA*, 301 F.3d at 1243 ("On remand, I can think of no remedy the district court could construct that would guarantee a correction of the agency failure alleged .... At most and at worst, the remedy granted would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate.").

committed the agency action to agency discretion. Thus, concerns regarding the existence of a "no-man's land" of agency activity not opened to judicial review fail to account for the fact that Congress has expressly acknowledged an intent not to allow judicial review of certain agency activities.

In summary, the APA limits "[private parties'] role to the ambit of particular agency decisions—to the rule on which they are commenting, the adjudication in which they are making an appearance, or the agency action that they are challenging in court." Rubin, *supra*, 89 Cornell L. Rev. at 103. The APA permits private parties to participate in the policy and management processes either through the rulemaking or adjudication schemes set out in the Act. Once the rulemaking or adjudication process ends, private parties can challenge the action under the judicial review section of the Act if the agency action is (1) final in nature and (2) violates federal law or the Constitution. Because Respondents cannot point to a single BLM order, regulation, license, sanction, relief, or the equivalent or denial thereof, or even to a completed universe of particular BLM orders and regulations, licenses, sanctions, etc., issued in violation of the "non-impairment" mandate or land use plans, the BLM's activities are not reviewable under the APA. *Lujan*, 497 U.S. at 890.

II

THE TENTH CIRCUIT'S FORMULATION WILL RESULT IN THE USURPATION OF THE ADMINISTRATIVE PROCESS BY THE JUDICIARY AND IN ADMINISTRATIVE PARALYSIS

The Tenth Circuit's approach impermissibly places the judiciary at the center of the administrative realm reserved for the executive branch. It does so through an expansive interpretation of the APA that allows judicial review of general programmatic goals, and converts them into enforceable obligations. This in turn empowers interest groups to turn to the courts to prioritize the BLM's management activities. Administrative paralysis will result as the bureau tries to enforce what will likely be conflicting court mandates.

The Tenth Circuit anchors its decision on a number of broad statutory duties requiring the BLM to manage its resources in accordance with the nonimpairment requirement or in accordance with land use plans. General statements of purposes or goals, similar to those found in the FLPMA, are customary in legislation and "are part of the motherhood-and-apple-pie of politics, and everyone knows that the statements represent ideals, not plans." James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 Va. L. Rev. 399, 435 (1986). Congress enacts high sentiments into law precisely because such pronouncements do not create enforceable obligations. "Before these sentiments are translated into real claims on government and society, Congress must go through the additional process of establishing the administrative machinery and appropriating the money to carry them out." *Id.*

Correctly viewed, then, "the BLM's land plans are aspirational . . . [and] the BLM is not required to meet each and every specific goal set forth in its land use plans or face potential litigation jurisdictionally based on § 706(1) for failing

to act." *SUWA*, 301 F.3d at 1245 (McKay, J., dissenting). Yet, the Tenth Circuit's decision, if allowed to stand, turns aspirational statements of program ideals into enforceable obligations—without regard to the administrative agency that has been delegated the task of turning goals into reality. "[A] host of mandatory, ongoing, continuous agency obligations [become] subject to attack pursuant to the majority's view of § 706(1) jurisdiction." *Id.* at 1242 n.3 (McKay, J., dissenting)

The BLM will face unprecedented paralysis as it tries to enforce conflicting court mandates. One court at the request of environmentalists can apply the Tenth Circuit's reasoning to justify issuing an order forcing the BLM to limit mechanized access into lands adjacent to wilderness study areas. At the same time, another court, applying the same reasoning and in response to requests of property owners, may issue an order compelling the BLM to allow such mechanized access to meet the hazardous fuel reduction requirements under the newly-enacted Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887, on the basis that the law requires "the Secretary [of the Interior] shall implement authorized hazardous fuel reduction projects in . . . Federal land in wildland-urban interface areas." *Id.*

Judicial intervention in the administrative process threatens unmitigated gridlock at the district court level, as every interest group grabs ahold of the APA to demand that trial courts second-guess the day-to-day activities of federal agencies. It is important to recognize that, while a plaintiff using this approach may not succeed on the merits, the judicial and executive branches will nonetheless suffer[3] under the

[3] The increase of litigation that will likely flow from the expansion of activities reviewable under the APA further burdens an already underfunded and understaffed federal judicial system. *See Rehnquist, Chief Justice William H., 2002 Year-End Report on the* (continued...)

litigation onslaught that will result if the Tenth Circuit's decision is not overturned.[4]

Through the years, PLF attorneys have represented the public interest with respect to the implementation of congressionally approved mandates to manage our nation's public lands for multiple uses that take human interests into account. We have participated in challenges, via the APA, of agencies' failure to implement final decisions which permit grazing, recreational access, mineral extraction, and timber harvesting. *See Public Lands Council v. Babbitt*, 529 U.S. 728 (2000). Other times, we have stood side-by-side with the administrative agencies as they fought attempts by environmental groups to use the APA in efforts to curb the management of public lands for multiple uses. *See Ohio Forestry*, 523 U.S. at 118; *Lujan*, 497 U.S. at 871.

As tempting as it may be to join the Respondents' attempt at expanding the application of the APA to authorize judicial challenge to activities of all kinds, we recognize that such an approach can only, in the long run, cause more harm than good. Opening the litigation door will result in a system paralysis in the management of our nation's administrative framework never before experienced. It will result in an unbalancing of the constitutional division of powers that will cause great disruption in our executive and judicial branches. It is critical that this Court not permit such disruption to occur.

[3] (...continued)
Federal Judiciary, at www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (Jan. 1, 2003.)

[4] This concern is expressed by the dissent: "However narrowly intended, the court's opinion has opened the floodgates of litigation for plaintiffs to challenge any mandatory agency obligation regardless of the amount of discretion afforded to the agency in carrying out its obligations." *SUWA*, 301 F.3d at 1246 (McKay, J., dissenting).

CONCLUSION

The Tenth Circuit's interpretation of APA Section 706 is inconsistent with the purpose and structure of the Act, and results in the judicial review of agency activities that would otherwise not be reviewable under the APA. For these reasons, this Court should reverse the decision of the court below.

DATED: January, 2004.

Respectfully submitted,

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